Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,
Petitioners,

v.

RITA SANDERS GEIER, *et al.*,
Respondents.

No. 79-55

TENNESSEE HIGHER EDUCATION COMMISSION,
Petitioner,

v.

RITA SANDERS GEIER, *et al.*, UNITED STATES OF AMERICA, RAYMOND RICHARDSON, JR., *et al.*,
Respondents.

RESPONSE OF STATE BOARD OF REGENTS TO PETITION(S) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Respondent, State Board of Regents, State University and Community College System of Tennessee prays that a Writ of Certiorari not issue to review the

judgment of the United States Court of Appeals for the Sixth Circuit entered on April 13, 1979, requiring a merger of Tennessee State University (hereinafter referred to as "TSU") and the University of Tennessee at Nashville (hereinafter referred to as "UT-N.")

OPINIONS BELOW

The opinions of the District Court in this case are reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968); *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); and *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977).

The opinions of the Court of Appeals requiring the merger and the denials of stay applications are not at this date officially reported. Copies of such opinions however can be found to the Appendix to the Petition for a Writ of Certiorari of the University of Tennessee and/or Tennessee Higher Education Commission.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1979. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was originally commenced in May of 1968 when the plaintiffs[1] sought the exercise of the injunctive powers of the District Court to enjoin the construction of a new complex to house UT-N on the legal theory that the construction, in a choice area of downtown Nashville, would further continue and strengthen a separate/dual and inferior system of higher education by the State of Tennessee for its Black citizens.

Thereafter the District Court denied the injunctive relief sought by the plaintiffs but concurrently found a dual system of higher education existed in the State of Tennessee. *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). At that time the District Court was of the opinion that the construction of the new complex to house UT-N ". . . would not necessarily perpetuate a dual system of higher education, but, rather might play a part in the furthering of the unitary system." (Finding of Fact No. 6, supra, 288 F.Supp. 937, 941.)

The District Court having found in 1968 a dual system of higher education, has subsequently proceeded to judicially mandate its dismantling through various orders discussed hereafter.

By as early as April 1970, the District Court in *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972) found that TSU had a student body of 99.7% Black and a corresponding 81% Black faculty; the State as a whole, except for TSU, was proceeding to dismantle the dual system; and the process used for achieving desegregation was not working at TSU and little reason existed to believe it would.

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[1]The parties during the "Statement of Case" will be referred to as they appeared in the District Court.

TSU was created by the General Assembly of the State of Tennessee as the State's sole Black institution of higher education in 1909; the college opened its doors in 1912 as Tennessee Agricultural and Industrial State Normal School for Negroes and subsequently received its present name pursuant to an Act of the Tennessee General Assembly. The racial requirement of being Black was removed as a prerequisite of admission to TSU in 1960. While TSU is historically an institution of higher education catering to Blacks, the university has been in theory a multi-racial institution for nineteen years.

Initially, the District Court adopted UT-N's argument that it was primarily a non-degree granting night school, whereas TSU operated a degree-granting daytime facility (288 F.Supp. 941). The District Court seeking to remedy the TSU "phenomenon" of 99.9 percent Black freshmen during the academic year 1970-71, on February 3, 1972, ordered that the defendants submit a plan to desegregate TSU and to consider the feasibility or non-feasibility of curriculum consolidation of undergraduate and graduate programs offered by the State's colleges in the general Nashville area. *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn. 1972)." 427 F.Supp. 644, 647.

In obedience to the February 3, 1972 Order a Plan was submitted by defendants; however, the United States, an intervenor, and plaintiffs took exception to its terms and conditions.

On July 31, 1972, Raymond Richardson and others as Black students, parents and faculty associated with TSU filed a motion to intervene; the Motion was granted on February 23, 1973. Concurrently the intervenors sought an injunction against the proposed creation of

campuses for Shelby State Community College in Memphis, Tennessee, on the ground that such action would result in racially segregated community college campuses.

Thereafter periodic progress reports on the desegregation activity in Tennessee's state maintained colleges and universities were filed with the Court. Concurrently, proposals providing that certain graduate and undergraduate programs would be offered exclusively at UT-N or TSU, or by some joint or cooperative method whereby TSU would be an essential and integral educational element, were proposed by the defendants Tennessee Higher Education Commission and the State Board of Regents. The University of Tennesse, however, according to the District Court resisted all attempts to diminish its role in Nashville whether the same were Court inspired or the handiwork of another state body with statutory responsibilities in higher education.

The Tennessee Higher Education Commission is a body created by statute for the purpose of coordinating the planning and financing of higher education in Tennessee. The State Board of Regents of the State University and Community College System, Tennesssee is the governing body charged by statute with the operation of the community college and regional university system, of which TSU is a part, and of which the University of Tennessee is not. The Board of Trustees of the University of Tennessee is the governing body charged by statute with the operation of the University of Tennessee and its auxiliary campuses and educational enterprises at Knoxville, Chattanooga, Tullahoma, Nashville, Memphis and Martin.

In the District Court's Order of February 15, 1974 the defendants were directed "to submit on or before August 1, 1974, a long range plan for desegrating Ten-

nessee's public institutions of higher education; the Court also granted all other parties the right to submit a plan or suggestion by the same date." 427 F.Supp. 644, 648. The defendant's long range plan was submitted July 21, 1974.

In addition, "[O]n or about July 31, 1974, the plaintiff-intervenors, Raymond Richardson, et al., filed the "Plan for the Dismantling of Tennessee Dual System of Public Higher Education," in which the plaintiff-intervenors established goals and timetables for black student enrollment, the employment of black faculty and administrators and the desegregation of Tennessee's higher education governance structure. With respect to the Nashville area, the intervenors, Raymond Richardson, et al., proposed that UT-N be absorbed by TSU." 427 F.Supp. 644, 649.

Thereafter numerous progress reports were filed with the District Court citing "the progress or lack thereof, achieved since the submission to the Court of the long Range Plan, which Plan had been supplemented by the defendants." 427 F. Supp. 644, 648.

In June of 1976, the defendants filed a Motion for Summary Judgment, "on the sole basis of the progress shown in their Desegregation Progress Report." 427 F. Supp. 644, 649. The Motion was denied and the trial was had from September 20, 1976 to October 20, 1976. (427 F.Supp. 644, 648-649).

The issue at trial was "whether the defendants . . . met the constitutional duty to dismantle the dual system of public higher education in Tennessee." 427 F.Supp. 644, 650.

The District Court in its Memorandum Opinion and Order filed on January 31, 1977 divided its opinion

into two areas of concern—(1) Long Range Desegregation Plan, and (2) the remedy for the Nashville/TSU phenomenon.

The District Court found the TSU problem to be an element of a state-wide scheme which evidenced:

> (1) ". . . regular progression of black enrollment (in historically white state-supported institutions of higher education) in terms of percentages of total enrollment:" 427 F.Supp. 644, 650, and
>
> (2) ". . . the predominatly white institutions are continuing to make steady progress, . . . (in achieving the dismantling of the dual system of higher education found to exist)" 427 F. Supp. 644, 651.

Addressing itself to the "peculiar situation in Nashville," the District Court determined "that the existence and expansion of predominantly white UT-N alongside the traditionally black TSU has fostered competition for white students and thus . . . impeded the dismantling of the dual system." 427 F.Supp. 644, 652.

The basis for such determination lay in the District Court's finding that:

> (a) Comparative/common educational programs both at UT-N and TSU remain predominantly one race at each institution." 427 F.Supp. 644, 652.
>
> (b) Programs of UT-N and TSU of a "joint or cooperative nature have had no appreciable impact on the desegregation of TSU." 427 F. Supp. 644, 655.
>
> (c) Programs allocated by the time of day in which they are offered, *i.e.,* day courses at TSU, night classes at UT-N are "overwhelmingly black at TSU . . . and predominantly white at UT-N . . . " 427 F.Supp. 644, 653.

(d) The "exclusive graduate teacher education program at TSU is the only program which has been able to attract a substantial number of white students." 427 F.Supp. 644, 655.

(e) Lastly, "joint, cooperative and exclusive programming has not resulted in progress toward eliminating the . . . dual system in Nashville . . . " 427 F.Supp. 644, 657.

Predicated upon the above the District Court found "that the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board." In arriving at the decision to merge the two institutions, Judge Gray noted that "merger under the Board of Regents" would be appropriate because of the "other three State institutions of higher education in Middle Tennessee are under this Board. Any problems of competition or duplicative programs can obviously best handled by one governing body." 427 F.Supp. 644, 660.

Concurrently with the decision to place the merged institution under the Board of Regents, the District Court noted "[F]or the Board of Trustees of UT to take over the merged institution would mean the elimination of TSU as an education institution with all the concomitant losses entailed therein." 427 F.Supp. 644, 660.

Inherent in the District Court's decision on the side of merger of UT-N into TSU under the Board of Regents was the fact that during September 20 through October 20, 1976 hearing the "expert witnesses all believe[d] that merger is an acceptable approach for desegregating the Nashville area, with most of the expert witnesses believing that merger is the best long range solution." 427 F.Supp. 644, 659.

Pursuant to the District Court's Judgment of February 28, 1977, the State Board of Regents submitted by May 16, 1977, seventy-five days after Judgment, a Plan of Merger formulated by "an advisory committee consisting of six persons, three to be named by the President of TSU and three to be named by the Chancellor UT-N." 427 F. Supp. 644, 661.

The University of Tennessee and the Tennessee Higher Education Commission appealed the decision of, now deceased, U.S. District Judge Frank Gray, Jr. to the United States Court of Appeals for the Sixth Circuit; and in particular, that portion of the Order mandating the two institutions be merged and that the Board of Regents' Plan of Merger, as submitted, be implemented. In an opinion written by Circuit Judge Lively, which was filed on April 13, 1979, the Court of Appeals affirmed the District Court's action; Circuit Judge Ingle dissenting. Stripped to its core, the Circuit Court determined that the "findings of the district court on the actions and inactions by the defendants are supported by substantial evidence and are not clearly erroneous. The conclusion that these actions and failures to act constitute a violaof the Constitutional duty to dismantle a dual system of public higher education is in accord with the pronouncements of the Supreme Court from *Brown II* to the present time." (UT Writ Appendix, p. 123a)

"Both the UT Board and the SBR have statewide jurisdiction over their respective systems." (UT Writ Appendix, p. 127A) The Court therefore concluded that:

> "Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the Court-ordered Plan for

dismantling that system." (UT Writ Appendix, p. 130a)

It is to have this decision (Case No. 77-1621, 1623, and 1625) of the U.S. Court of Appeals for the Sixth Circuit reviewed that the petitioners University of Tennessee and Tennessee Higher Education Commission pray that a Writ be issued.

REASONS FOR NOT GRANTING WRIT

At this time, the merger of the University of Tennessee at Nashville into the surviving Tennessee State University is an accomplished fact. Acceptance by students, faculty, as well as the Nashville community for the merged institution will be further advanced by the termination of this more than decade old litigation.

The legal issues raised in the respective petitions filed by the Tennessee Higher Education Commission, and more particularly, the University of Tennessee have been resolved by this Court in *Dayton Board of Education, et al. v. Brinkman, et al.*, ___ U.S. ___, 47 LW 4945 (unofficially), and *Columbus Board of Education, et al. v. Pennick, et al.*, ___ U.S. ___, 47 LW 4924 (unofficially), adversely to the contentions argued by petitioners. Petitioner University of Tennessee in discussing *Dayton, supra* and *Columbus, supra,* throughout its petition (obviously prepared prior to this Court's publication of two mentioned decisions) termed the appealed from decisions of the Sixth Circuit, in each instance, as a deviation "from the principles of Constitutional law enunciated by this Court, and *such deviation cannot be permitted to stand as the law of this case,* particularly in view of its importance to the persons involved and its broad public importance." (UT Petition for Writ of Certiorari, p. 17.) (Our emphasis.)

This Court having sustained in each instance the decision of the Sixth Circuit, cited by the University of Tennessee as a case where the Circuit had "clearly deviated from the principles of Constitutional law enunciated by this Court," the Petitions are obviously now moot.

The "nub of the argument" advanced by the University of Tennessee is that no finding existed below, that the University of Tennessee engaged in actual and culpable discrimination, and as such no system-wide impact exists and, *ergo,* no system-wide remedy is applicable and/or equitably available. As authority the University of Tennessee places exclusive reliance upon this Court's Opinion in the first round of *Dayton Board of Education, et al. v. Brinkman et al.*, 433 U.S. 406 (1977).

On remand in *Dayton,* the District Court (446 F.Supp. 1232 S.D. Ohio) found that the "plaintiffs had failed to show either discriminatory purpose or segregative effect or both, with respect to the challenged practices and policies. . . " (47 LW 4945). The Sixth Cirucit reversed (583 F.2d 243), indicating "that at the time of *Brown I,*[2] the Dayton Board was operating a dual system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a system-wide remedy." 47 LW 4946. It is this decision of the Sixth Circuit which the University of Tennessee would lead this Court to believe "does violence to the very carefully articulated rationale"

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[2] *Brown v. Board of Education* 347 U.S. 483 (1954).

of this Court's 1977 Opinion in *Dayton I.* (UT Petition for Writ, p. 22)

Neither the University of Tennessee nor the Tennessee Higher Education Commission argue in this cause that a dual system did not in fact exist statewide prior to 1954 and that it was continued after *Brown I* until 1960 by operation of State statute in both the University of Tennessee and State Board of Regents[3] respective systems. As noted in *Dayton, supra,* and as applied to this cause, petitioner University of Tennessee and respondent State Board of Regents were after "1954 . . . under a continuing duty to eradicate the effects of that system . . . and that . . . prima facie proof that current segregation was caused at least in part by prior intentionally segregative official acts" (47 LW 4947) would give rise to systemwide relief.

It is abundantly clear from the record in this cause that the underlying problem in Nashville, which resulted in TSU being predominantly Black and UT-N predominantly white, had its genesis in the dual system of higher education in Tennessee created by statute prior to 1960; a fact the District Court found to exist. Thus having made that factual determination—which is not challenged by either petitioner as clearly erroneous—District Judge Gray properly exercised his equitable powers and mandated the merger of the two institutions; for as the Circuit Court noted, "If the situation in Nashville were remedied, there would be promise of greater progress throughout the system." (UT Writ Appendix, p. 130a)

The July 2, 1979 opinions of this Court in *Dayton, supra* and *Columbus, supra* are dispositive of all issues

[3]Then known as State Board of Education.

raised by petitioners and mandate that a Writ of Certiorari not issue in either case.

Further, the public will and tranquility, as well as the furtherance of academic intercourse on the respective campuses, will be served by the denial of each Petition.

CONCLUSION

For the above reasons, a Writ of Certiorari should not issue to review the Judgement and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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